

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE
UNITED STATES DISTRICT
COURT FOR THE WESTERN
DISTRICT OF WASHINGTON
AT SEATTLE IN

QWEST CORPORATION,

Plaintiff,

v.

CITY OF KENT,

Defendant.

No. 78293-8

En Banc

Filed August 10, 2006

C. JOHNSON, J.—This case involves two certified questions from the United States District Court for the Western District of Washington. First, we are asked to determine what the legislature intended when it used the term “aerial supporting structures” in RCW 35.99.060(3)(b). Second, we are asked to determine if a telecommunications company that is entitled to reimbursement under RCW 35.99.060(3)(b) is entitled to recover the full incremental cost of the relocation or only a proportionate share of the cost based on the number of “aerial supporting

structures” owned. The United States District Court noted an absence of either Washington case law or legislative history providing guidance on these issues. The court observed that any interpretation it imposed on the statute would be purely speculative, would not be binding, and would do little to settle the question for future litigants. Because the issue could arise again, the United States District Court stayed the federal court action and certified the issues to this court.

FACTUAL AND PROCEDURAL HISTORY

Defendant, the city of Kent (Kent), required plaintiff, Qwest Corporation (Qwest), to relocate its aerial telecommunications facilities in three different areas and move them to underground locations pursuant to RCW 35.99.060(1). The first project was located along First and Fourth Streets in Kent; the second project was located along Russell Road in Kent; the third project was located along Pacific Highway in Kent. Qwest complied with Kent’s requirement and, pursuant to RCW 35.99.060(3)(b), submitted a bill to Kent for the difference in costs between a hypothetical aerial to aerial relocation and the actual aerial to underground relocation for each project. According to Qwest, it is entitled to \$538,015.58 from

Kent for all three projects.

Although Kent agrees Qwest is entitled to reimbursement under the statute, Kent disputes the amount of reimbursement it owes. Accordingly, Kent refused to pay Qwest's bill. Qwest filed an action in United States District Court. Both parties filed cross-motions for partial summary judgment on the statutory interpretation issues. The United States District Court, after hearing arguments on the motions, certified the questions to this court.

CERTIFIED QUESTIONS

(A) Does the term "aerial supporting structures" as used in RCW

35.99.060(3)(b) mean only

(1) the wide variety of telecommunications and electrical poles, glu-lams, "push-brace" poles, H-frames, towers and similar structures to which providers may attach their wires in order to suspend them in the air, or does it also include

(2) all other attachments and hardware that keep telephone wires in the air, including but not limited to strand, bolts, cross-arms, guy wires,

brackets and other hardware associated with these items?

- (B) Where aerial to underground relocation of authorized facilities is required by a city or town under RCW 35.99.060(1), for service providers with an ownership share of the “aerial supporting structures,” is the city required to reimburse the full additional incremental cost of underground compared to aerial location or only the additional incremental cost proportionate to the percentage of “aerial supporting structures” owned by the service provider?

ANALYSIS

Telecommunications companies, when placing their facilities,¹ often use public rights-of-way owned by a city or town. The use of these rights-of-way by the companies is governed by chapter 35.99 RCW. The city or town that owns the right of way has the authority to require the company to relocate its facilities when

¹ Facilities are defined as “all of the plant, equipment, fixtures, appurtenances, antennas, and other facilities necessary to furnish and deliver telecommunications services and cable television services, including but not limited to poles with crossarms, poles without crossarms, wires, lines, conduits, cables, communication and signal lines and equipment, braces, guys, anchors, vaults, and all attachments, appurtenances, and appliances necessary or incidental to the distribution and use of telecommunications services and cable television services.” RCW 35.99.010(2).

reasonably necessary. RCW 35.99.060(1). Generally, the telecommunications company, also called a service provider, must bear the cost of relocation. However, the legislature carved out three exceptions to this rule, only one of which is at issue here. Under the exception at issue, the service provider may seek reimbursement when the city requires an aerial to underground relocation and the service provider has an ownership share in the aerial supporting structures. RCW 35.99.060(3)(b). Here, Kent required Qwest to relocate its facilities from an aerial to an underground location pursuant to RCW 35.99.060(1). Qwest argues that it is entitled to reimbursement for the relocation under RCW 35.99.060(3)(b). Kent agrees Qwest is entitled to reimbursement under this exception, but disputes the amount of money Qwest is entitled to recover. Specifically, the parties dispute the definition of the term “aerial supporting structures” and whether the statute requires a proportionate reimbursement scheme.

Aerial Supporting Structures

Qwest argues the term “aerial supporting structures” is not limited to poles or pole-like structures, but instead includes strand, down-guys, cross-arms, and any

other attachment hardware used to keep aerial cable supported.² Qwest asserts its definition is supported by the plain and ordinary meaning of the term, by the legislative history of the statute, and by the fact that the disputed term is a term of art in the telecommunications industry.

Kent contends that the term “aerial supporting structures” means telephone poles, cable television poles, power transmission and power distribution poles, H-frames, glu-lams, and towers.³ Kent argues the legislature could not have intended the term to include strand or other attachment hardware because a service provider always owns its cable, strand, and hardware even if it does not own the poles to which they are attached. Kent points out that, under Qwest’s definition, the

² Strand is steel wire attached directly to cable in order to support the cable between poles. Cable is not strong enough to support itself and strand is always used for aerial cable. When poles are perfectly in line, the cable and strand are attached to the poles using a variety of fasteners such as nuts, bolts, washers, and clamps. However, when one pole is out of line, attaching the cable to the pole would exert a sideways as well as downward force upon the pole. Here, a company might attach a cross-arm to a pole. A cross-arm is a piece of wood attached to a pole that sticks out from the pole far enough so that the cable may be attached to the cross-arm without changing the cable’s direction. This keeps the cable in a straight line and prevents it from exerting the sideways and downward force upon the pole. A company could also attach the cable to the pole itself and then use a down guy, a piece of galvanized steel, attached to the pole in the opposite direction to offset the force exerted by the cable.

³ H-frames consist of multiple vertical poles attached by a cross-brace. A glu-lam is generally the same height as a transmission pole but is composed of multiple planks or boards glued together for structural strength. It looks more like a construction beam than a pole.

telecommunications company would always have an ownership share in the “aerial supporting structures.” Thus, the statute’s explicit requirement that a service provider have an ownership share in the aerial supporting structures would be superfluous. Finally, Kent asserts RCW 35.99.060(3)(b) is a narrow exception to the general rule that telecommunications companies should bear the cost of relocation. Under Qwest’s definition, the articulated exception of reimbursement would swallow the nonreimbursement rule because the city would always be required to reimburse the service provider for an aerial to underground relocation.

RCW 35.99.060(3)(b) reads “[w]here aerial to underground relocation of authorized facilities is required by the city or town under subsection (1) of this section, *for service providers with an ownership share of the aerial supporting structures*, the additional incremental cost of underground compared to aerial relocation, or as provided for in the approved tariff if less, will be paid by the city or town requiring relocation.” (Emphasis added.) When interpreting statutory language, our goal is to fulfill the intent of the legislature. In ascertaining this intent, the language at issue must be evaluated in the context of the entire statute. We avoid

interpretations that are strained, unlikely or unrealistic. *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 149, 3 P.3d 741 (2000).

Between the definition offered by Qwest and the definition offered by Kent, Kent's definition is more consistent with the overall language of the statute. Kent's definition gives the clause "for service providers with an ownership share of the aerial supporting structures" substance. For example, on the Pacific Highway relocation project at issue here, Qwest had cable attached to 100 out of 100 poles. However, Qwest owned only 21 of the 100 poles. Under Kent's proposed definition, Qwest would be entitled to reimbursement under the statute because Qwest had a 21% ownership share in the "aerial supporting structures." If, on the other hand, Qwest had not owned any of the poles on the project, Qwest would not be entitled to any reimbursement under RCW 35.99.060(3)(b). Under Qwest's proposed definition of "aerial supporting structures," Qwest would be entitled to reimbursement in both situations.

Additional Incremental Cost

Qwest argues that the language of RCW 35.99.060(3)(b) requires the city to

reimburse a service provider for the full value of the difference between an aerial to aerial relocation and an aerial to underground relocation. Qwest contends this is because the increased cost of undergrounding is not related to the number of aerial structures owned, but results from digging the trench for the underground facilities; laying the duct, conduit, and cable; installing new equipment vaults; splicing underground cable to the existing system; and paying expenses arising from mobilization and general condition costs.⁴ Qwest asserts that, as a matter of policy, the legislature intended the city to bear any additional cost of underground as compared to aerial relocation because the city, by requiring a service provider to underground its facilities, is responsible for imposing the additional cost.

Kent argues that the statute requires a city or town to reimburse the service provider for a proportionate share of the increased cost of undergrounding based on the share of aerial supporting structures owned by the provider. Kent maintains the

⁴ Qwest defines mobilization cost as “the cost associated with physically getting project materials and construction equipment to a project site at the beginning of a project.” Qwest defines general conditions costs as “the costs associated with the project as a whole but not specifically allocated to a particular task, such as the costs associated with project superintendents and engineers, ongoing equipment rentals or maintenance, safety and flag personnel to direct traffic, equipment and material supply storage, etc.” Pl.’s Br. at 18, n 7 & 8.

reimbursement is a way to offset the expense a service provider sustains by planning, designing, erecting, and maintaining poles. Kent asserts that because a service provider does not incur these expenses when it attaches its cable to someone else's pole, the legislature did not intend to reimburse the provider in that circumstance.

The language of RCW 35.99.060(3)(b) provides “[w]here aerial to underground relocation of authorized facilities is required by the city or town under subsection (1) of this section, for service providers with an ownership share of the aerial supporting structures, *the additional incremental cost of underground compared to aerial relocation*, or as provided for in the approved tariff if less, will be paid by the city or town requiring relocation.” (Emphasis added.) Statutory interpretation requires this court to give effect to the legislature’s intent. When the language of a statute is unambiguous, the legislative intent is apparent. Where the legislature omits language from a statute, whether intentionally or inadvertently, this court will not read into the statute the language it believes was omitted. *State v. Cooper*, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006).

Neither party asserts that any phrase in the statute, other than “aerial supporting structures” is ambiguous. When a service provider has an ownership share of “aerial supporting structures,” the city must reimburse the provider the additional incremental cost. The term “incremental cost” is not defined in the statute or in the definitions section of chapter 35.99 RCW. In the absence of a given definition, we turn to a standard dictionary to ascertain the plain and ordinary meaning of a term. *State v. Watson*, 155 Wn.2d 574, 579, 122 P.3d 903 (2005). Incremental is the adjective form of the word increment. Increment is defined as “the process of increasing in number, size, quantity, or extent.” The American Heritage Dictionary of the English Language 889 (4th ed. 2000). Thus, the term “incremental cost” refers to an increase in cost. We find the phrase “the additional incremental cost of underground compared to aerial relocation” refers to an amount equal to the actual aerial to underground cost minus the estimated aerial to aerial relocation cost.

CONCLUSION

The term “aerial supporting structures” refers to poles and pole-like

structures. RCW 35.99.060(3)(b) requires a city to reimburse a service provider for an aerial to underground relocation of its facilities when the service provider owns a portion of the aerial supporting structures as defined above. The amount the city is required to reimburse the service provider is the difference between an estimated aerial to aerial relocation and the actual aerial to underground relocation of the same facilities.

AUTHOR:

Justice Charles W. Johnson

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Tom Chambers

Justice Susan Owens

Justice James M. Johnson

Justice Bobbe J. Bridge

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